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PROTECTIVE ORDERS RESTRICTING DISCLOSURE OF DISCOVERY IN FEDERAL CIVIL PROCEEDINGS

The Federal Rules of Civil Procedure, formulated by the United States Supreme Court in 1937,¹ permit a liberal discovery process.² The problem of abusive, oppressive, or burdensome discovery³ necessitated a mechanism by which a party could restrict such discovery. In response to the problem, the Supreme Court adopted Federal Rule of Civil Procedure 26(c) which allows any person against whom discovery is sought to obtain a protective order, upon a showing of good cause, to protect against annoyance, embarrassment, oppression, or undue burden or expense.⁴ Rule 26(c) provides for many different types of restrictions to control abusive discovery,⁵ one of which is a limitation on

1. In 1937, the United States Supreme Court formulated the Federal Rules of Civil Procedure pursuant to congressional authorization. 28 U.S.C. § 2072 (1976). Congress may scrutinize, and, where appropriate, veto the judicially formulated rules during a mandatory ninety-day "lay-over period" between the time they are reported by the Chief Justice and their effective date. *Id.*

2. See *Hickman v. Taylor*, 329 U.S. 495 (1947); FED. R. CIV. P. 26-31, 33-36.

3. See 4 MOORE'S FEDERAL PRACTICE ¶¶ 26.69-26.78 (1979) [hereinafter referred to as MOORE]; Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958); Note, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117 (1949) [hereinafter referred to as *Tactical Use and Abuse*].

4. Rule 26(c), the substance of which was originally enacted in 1937 as rule 30(b), provides: Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. . . .

FED. R. CIV. P. 26(c).

Prior to reorganization of the discovery rules in 1970, protective orders were obtained under rule 30(b), which also provided for taking depositions by oral examination. Rule 30(b) was made applicable to the other discovery procedures, such as written depositions, interrogatories, and requests for production of documents, by cross-reference. See MOORE, *supra* note 3, at ¶ 26.01 [20]. In 1970, the language of 30(b) was changed to that in rule 26(c) to broaden the application of protective orders to discovery in general. 28 U.S.C. app. Rule 26, Notes of Advisory Committee on 1970 Amendment to Rule 26 (1976).

5. See text accompanying notes 29-34, 44-48 *infra*.

the extrajudicial disclosure of information received through discovery. This restriction is often sought to protect a party's secrets from being publicized.

To obtain a protective order under rule 26(c) to restrict disclosure of discovered information, an applicant must satisfy the rule's "good cause" requirement⁶ by showing sufficient reason for granting the order.⁷ The courts in general have struggled over the degree of harm a party must show to meet the good cause requirement. Applying the good cause requirement to orders restricting disclosure of discovered information has caused the courts particular confusion because of the first amendment interests involved in any ban on disclosure. Some courts have held that the similarity between such orders and prior restraints on freedom of speech mandates an application of the strict first amendment standard used to judge prior restraints.⁸ Until recently, whenever courts have applied the strict constitutional standard to orders restricting disclosure of discovery, the requested limitation has been denied.⁹

Civil libertarians will be relieved by recent decisions which deny orders restricting disclosure of discovery on the basis of first amendment interests. Others, perhaps possessing a more practical perspective on litigation, see such decisions as creating a new tool in litigation strategy: An aggressive attorney, protected by the first amendment guarantee of free speech, could use an implied threat of disclosure of information obtained in discovery for leverage in the pending litigation.¹⁰

This note will discuss protective orders restricting the disclosure of information obtained through discovery in federal civil proceedings. The note will analyze rule 26(c)'s provision for protective orders, with focus on the good cause requirement. Cases involving restrictions on disclosure of trade secrets will be discussed. The constitutionality of restrictions on disclosure of discovery then will be examined by focusing on the recent decision by the United States Court of Appeals for the District of Columbia Circuit, *In re Halkin*.¹¹

6. See text accompanying notes 19-25 *infra*.

7. *Id.*

8. See text accompanying notes 167-88 *infra*.

9. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977). However, the protective orders in both of these cases did not seek to prohibit disclosure of trade secrets which traditionally have enjoyed substantial protection. See text accompanying notes 83-95 *infra*. But see *Brink v. Dalesio*, 82 F.R.D. 664 (D. Md. 1979).

10. See *Tactical Use and Abuse*, *supra* note 3, at 136, 138.

11. 598 F.2d 176 (D.C. Cir. 1979).

PROTECTIVE ORDERS UNDER RULE 26(C)

The somewhat limited discovery process of the nineteenth century¹² finally blossomed into a very liberal and open inquiry when, in 1937, the United States Supreme Court enacted rule 26 of the Federal Rules of Civil Procedure which provides for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."¹³ However, these broad discovery rules do not entitle a party to an unlimited inquiry. Federal Rule of Civil Procedure 26(c) allows a party, by motion, to obtain "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" in discovery.¹⁴ In so doing, the rule leaves it to the discretion of the court¹⁵ to decide what restrictions on an otherwise broad and liberal discovery process¹⁶ may be necessary in a

12. These limitations were: (1) discovery only of facts which pertained to the discoverer's case, not evidence adversary had collected against discoverer, 6 J. WIGMORE, EVIDENCE §§ 1846, 1856(b)&(c) (Chadbourn rev. 1976) [hereinafter referred to as WIGMORE]; (2) discovery only of facts otherwise unavailable to the discoverer, *Hubert v. New York, New Haven & Hartford R.R.*, 90 Conn. 261, 96 A. 967 (1916); most courts, however, allowed discovery of facts helpful to the discoverer's case, *Green v. Selznick*, 220 App. Div. 12, 221 N.Y. Supp. 63 (1927); *Albanos v. New Syndicate Co.*, 130 Misc. 566, 224 N.Y. Supp. 331 (1927); (3) discovery only of facts admissible in evidence at trial, *Missouri v. Harris*, 355 Mo. 176, 195 S.W.2d 645 (1946); (4) discovery only against the adverse party, WIGMORE *supra* at §§ 1856(a)&(d).

Many states in the 1800's enacted statutes to confer upon the common law courts the power to compel discovery; but, again, these powers were extensively limited. *See* PUB. STAT. LAWS OF CONN. ch. 3, § 1 at 4 (1836-37); VA. LAWS ch. XI, § 68 (1830-31). For a general discussion, *see* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 204-06 (1952). Despite their limitations, these statutes marked a change in attitude toward discovery. Pretrial discovery increasingly was viewed as a valuable tool in information gathering over and above the mere need for trial evidence not otherwise available. Expressing this view, the framers of the 1848 New York Code of Procedure found discovery to be "in harmony with the whole spirit of [their] design; which is, to get at the facts in a legal controversy by the shortest possible way. . . ." N.Y. CODE OF PROCEDURE, First Report of the Commissioners on Practice and Pleadings 241 (1848). *See also* G. RAGLAND, DISCOVERY BEFORE TRIAL, 16-18, 25, 26 (1932).

13. FED. R. CIV. P. 26. Such a definition is extremely broad in scope and implements a very liberal discovery process. *Hickman v. Taylor*, 329 U.S. 495 (1947). Justice Murphy, in *Hickman*, clearly delineated the Court's attitude toward its enactment of a liberal discovery process: "Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Id.* at 501. The United States Supreme Court's purpose in formulating such a liberal discovery policy was to produce a just, speedy, and inexpensive determination of every action. *See* *United States v. Continental Cas. Co.*, 303 F.2d 91 (4th Cir. 1962); *National Bondholders Co. v. McClintic*, 99 F.2d 595 (4th Cir. 1938). Liberal discovery accomplishes this objective by narrowing and clarifying the basic issues between the parties and by ascertaining the facts relative to those issues. *Hickman v. Taylor*, 329 U.S. 495 (1947).

14. FED. R. CIV. P. 26(c). Formerly rule 30(b), the rule was changed to 26(c) in 1970. *See* note 4 *supra*.

15. Justice Murphy, in *Hickman v. Taylor*, 329 U.S. 495 (1947), emphasized the broad scope of these orders when he said that "limitations inevitably arise when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry." *Id.* at 507-08.

16. *See* note 13 *supra*.

particular case.¹⁷ The justification for giving the court such broad power to limit discovery derives from the traditional notion of the inherent powers of the court over its own process.¹⁸

Rule 26(c)'s requirement that a party seeking a protective order must show good cause determines the extent to which a protective order may restrict discovery.¹⁹ The burden is on the moving party to show good cause, that is, some plainly adequate reason for the order.²⁰ The courts have insisted on specific showings of fact, rather than conclusory statements, to establish good cause.²¹ A court must have before it enough information to assess the nature and magnitude of the moving party's interests.²² The degree of specificity with which this information must be presented depends in each case upon the kind of protective order sought.²³ The court will then balance the moving party's interests in restricting the discovery against the non-moving party's need for discovery²⁴ to determine whether and what type of limits on discovery should be imposed.²⁵

17. See, e.g., *Chemical & Indus. Co. v. Druffel*, 301 F.2d 126, 129 (6th Cir. 1962); *United States v. Brussell Sewing Mach. Co.*, 3 F.R.D. 87, 88 (S.D.N.Y. 1943).

18. In *Krippendorf v. Hyde*, 110 U.S. 276 (1884), the United States Supreme Court noted that "the equitable powers of courts of law over their own process to prevent abuse, oppression and injustice are inherent and equally extensive and efficient. . . ." *Id.* at 283. See also *Buck v. Colbath*, 70 U.S. 334 (1865).

19. See FED. R. CIV. P. 26(c). See also *United States v. Purdome*, 30 F.R.D. 338, 341 (W.D. Mo. 1962); *Velasquez v. South Atl. S.S. Line, Inc.*, 11 F.R.D. 196 (S.D.N.Y. 1951); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950).

20. *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975); *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402 (E.D. Wash. 1977); *United States v. IBM*, 66 F.R.D. 186, 189 (S.D.N.Y. 1974).

21. See, e.g., *White v. Wirtz*, 402 F.2d 145 (10th Cir. 1968); *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D. Mo. 1969).

22. *In re Halkin*, 598 F.2d 176, 210 (D.C. Cir. 1979) (Wilkey, J., dissenting).

23. Compare *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975), where the court required a strong showing of good cause before a party can be denied entirely the right to take a deposition with *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963), where the court granted a protective order in a patent infringement action to restrict disclosure of trade secrets although defendant had not substantiated its allegations as to the existence of the trade secrets; see also MOORE, *supra* note 3, at ¶¶ 26.68-26.78.

24. In evaluating the need for discovery in the litigation at hand, a court will look to whether the information is relevant to the discover's case. *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960). Relevancy is defined as the likelihood that useful evidence may be found. *Id.* at 659. A court will also look to how crucial the information is to his case. *Cf. Royal Exchange Assurance v. McGrath*, 13 F.R.D. 150, 152 (S.D.N.Y. 1952) (the court stated that the necessity of the discovery for the preparation of the case is a factor to determine whether good cause exists for plaintiff's inspection).

A court may also look to whether the information is otherwise available, although availability of information alone will not justify the granting of a protective order. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 998 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

25. See, e.g., *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *Hyam v. American Export Lines, Inc.*, 213 F.2d 221 (2d Cir. 1954); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y.), *appeal dismissed*, 371 U.S. 207, *cert. denied*, 371 U.S. 932 (1961).

Besides granting general power to the courts to remedy abusive discovery, rule 26(c) sets out eight specific restrictions which may be imposed through protective orders.²⁶ These eight restrictions represent the customary limits imposed on an abusive inquiry. They can be divided into two categories: restrictions on the initial receipt of information through discovery²⁷ and restrictions on the disclosure of information once it is received through discovery.²⁸ The first category of restrictions provides for the prohibition of discovery altogether,²⁹ as well as for limitations on the time, place, and manner of discovery.³⁰ These restrictions may also be used to limit the quantity and quality of the discovery.³¹ The second category of restrictions provides for the private discovery of secret information,³² the sealing of discovered information to be opened only by the court,³³ and limitations on disclosure of trade secrets.³⁴

The bifurcation of rule 26(c)'s restrictions arises from a reading of the cases deciding on the 26(c) restrictions as well as from a reading of rule 26(c) itself.³⁵ Restrictions on the receipt of information have been used to prevent harm that may result directly from the discovery process.³⁶ For example, if too many interrogatories are propounded, or if an unreasonably long deposition is requested, a restriction of the first

26. FED. R. CIV. P. 26(c)(1)-(c)(8). A party seeking a protective order would usually request one of these eight specific restrictions. Nevertheless, if a party seeks a limitation not found in any of the eight provisions, he may seek any order "which justice requires" under rule 26(c)'s general grant of power. *See* MOORE, *supra* note 3, at ¶26.78.

27. FED. R. CIV. P. 26(c)(1)-(c)(4).

28. *Id.* 26(c)(5)-(c)(8).

29. *Id.* 26(c)(1). *See, e.g.,* Donnelly v. Parker, 486 F.2d 402 (D.C. Cir. 1973); Associated Metals & Minerals Corp. v. S.S. Geert Howaldt, 348 F.2d 457 (5th Cir. 1965).

30. FED. R. CIV. P. 26(c)(2), (c)(3). *See, e.g.,* Finkelstein v. Boylan, 33 F. Supp. 657 (S.D.N.Y. 1940) (time); Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp., 26 F.R.D. 592 (D.N.J. 1960) (place); Fishman v. A.H. Riise Gift Shop, Inc., 68 F.R.D. 704 (D.V.I. 1975) (manner).

31. FED. R. CIV. P. 26(c)(4). *See, e.g.,* Herron v. Blackford, 264 F.2d 723 (5th Cir. 1959) (quantity); Williams v. Thomas Jefferson Univ., 343 F. Supp. 1131 (E.D. Pa. 1972) (quality).

32. FED. R. CIV. P. 26(c)(5).

33. *Id.* 26(c)(6), (c)(8).

34. *Id.* 26(c)(7).

35. For cases involving 26(c) restrictions (1)-(4), *see* notes 29-31 *supra*. For cases involving 26(c) restrictions (5)-(8), *see* text and accompanying notes 99-110 *infra*.

36. *See, e.g.,* DeDalmady v. Price Waterhouse & Co., 62 F.R.D. 157 (D.P.R. 1973) (plaintiff was granted an order to hold a deposition in Venezuela, his residence, due to the financial hardships that would be imposed upon him if the deposition were held in Puerto Rico); Global Maritime Leasing, Inc. v. M/S North Breeze Navigation Co., 451 F. Supp. 965 (D.R.I. 1978) (an order preventing discovery was granted because the discovery, which was sought eight years after commencement of the action, required considerable time, effort, and cost to produce); *In re* United States Financial Securities Litigation, 74 F.R.D. 497 (S.D. Cal. 1975) (the court prohibited discovery because interrogatories would cost approximately \$24,000 to answer).

category is sought to prevent the burdensome discovery mechanism.³⁷ Restrictions on the disclosure of information have been used to prevent harm that would result from the dissemination of the discovered information.³⁸ Thus, if interrogatories ask for secret information, a restriction of the second category would normally be sought to prevent disclosure of the information.³⁹

The division of rule 26(c)'s eight restrictions into two distinct categories is not absolute. Litigants who attempt to prevent disclosure of trade secrets may seek a protective order to restrict discovery altogether.⁴⁰ Courts, however, are reluctant to grant such restrictions⁴¹ and generally prefer to rely on restrictions which prevent the disclosure of secret information obtained through discovery.⁴² Nevertheless, the distinction between the two categories of restrictions is important because rule 26(c)'s good cause standard differs when it is applied to each respective category.⁴³

Restrictions on Disclosing Information Received Through Discovery

Rule 26(c) specifically provides for four separate types of protective orders which restrict the disclosure of discovered information.⁴⁴ A court may order "that discovery be conducted with no one present except persons designated by the court,⁴⁵ that a deposition after being sealed be opened only by order of the court,⁴⁶ that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way,⁴⁷ and that the parties simultaneously file specific documents or information enclosed in sealed envelopes to be opened as directed by the court."⁴⁸ These

37. See, e.g., *Banana Dist. v. United Fruit Co.*, 19 F.R.D. 493 (S.D.N.Y. 1956).

38. See text accompanying notes 44-76 *infra*.

39. See, e.g., *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

40. *Everco Indus., Inc. v. O.E.M. Prod. Co.*, 362 F. Supp. 204 (N.D. Ill. 1973).

41. See *MOORE*, *supra* note 3, at ¶26.69. See also *Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578 (S.D.N.Y. 1962).

42. See *Natta v. Zletz*, 405 F.2d 99, 101 (7th Cir. 1968); *Carter Prods., Inc. v. Eversharp*, 360 F.2d 868, 872-73 (7th Cir. 1966).

43. See text accompanying notes 56-76 *infra*.

44. It is evident from the language of these provisions that the Supreme Court intended their use specifically for restricting the disclosure of information received through discovery. The courts have similarly construed the language of these provisions. See text accompanying notes 35-39 *supra*. However, they by no means present the only provisions by which the disclosure of information received through discovery may be restricted. See text accompanying notes 40-42 *supra*.

45. FED. R. CIV. P. 26(c)(5).

46. *Id.* 26(c)(6).

47. *Id.* 26(c)(7).

48. *Id.* 26(c)(8).

provisions allow the party against whom discovery is sought to restrict in some way the disclosure of discovered information despite the general rule that pretrial proceedings in the federal judicial system are conducted in public and become part of the public record.⁴⁹

The scope of possible restrictions on disclosure of discovered information is wide. Restrictions on the dissemination of deposition transcripts have been allowed,⁵⁰ as well as restrictions on the disclosure of the information revealed at the depositions.⁵¹ At times, restrictions imposed have been so broad as to limit disclosure of discovery solely to the discoverer's counsel, researchers, and consultants⁵² for use in the litigation at hand.⁵³

Rule 26(c) requires that the party seeking a protective order which restricts the disclosure of discovered information show good cause why the information should not be made public.⁵⁴ In practice, rule 26(c)'s required showing of good cause by a party seeking to restrict the disclosure of discovered information differs slightly from the good cause showing necessary to obtain an order restricting discovery initially. Indeed, requests for both types of restrictions are judged by a balancing test,⁵⁵ where the harm to the discoveree is weighed against the need for either the discovery or the disclosure of the discovered material. Yet, a stricter standard is used to evaluate restrictions on disclosure of discovery material,⁵⁶ due in part to the difficulty in assessing any harm which

49. *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1974); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972). See also *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (purpose of the federal rules is to force full and open disclosure). Cf. FED. R. CIV. P. 43(a) (in all trials, the testimony will be taken in open court).

Many states, either by statute or by constitution, guarantee public trials for civil litigants. See, e.g., CAL. CONST. art. 1, § 15; CAL. CIV. CODE § 124 (West 1979); N.Y. JUD. LAW § 4 (McKinney 1978); OR. CONST. art. 1, § 10; OR. REV. STAT. § 1.040 (1977); WIS. STAT. ANN. § 256.14 (West 1971).

50. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *International Prods. Co. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

51. *International Prods. Co. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

52. *Maritime Cinema Serv. Corp. v. Movies En Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973); *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1970); *National Utility Serv., Inc. v. Wisconsin Centrifugal Foundry, Inc.*, 49 F.R.D. 30 (E.D. Wis. 1970).

53. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971). However, two cases reveal discontent with such a restriction. In *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973), the court denied a restriction sought to limit use of discovery to the litigation at hand when parties involved agreed to keep sensitive information secret. In *Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970), the court refused to limit the use of discovery when the movant failed to show that discoverer's attorneys were using the information to stir up litigation or to create improper publicity.

54. FED. R. CIV. P. 26(c). See, e.g., *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

55. See text accompanying notes 19-25 *supra*.

56. See *Consolidated Box Co. v. United States*, 18 F.R. Serv. 2d 115 (Ct. Cl. 1973). See also text and accompanying notes 59-76 *infra*.

may result,⁵⁷ and in part to the first amendment interests involved.⁵⁸ Thus, a party is required to show more compelling reasons for the issuance of an order to restrict disclosure of information obtained through discovery than to restrict discovery itself.⁵⁹

The harm to the discoveree, one side of the balancing test used by courts when applying rule 26(c)'s good cause standard, is harder to assess when the harm is due to unrestricted disclosure of discovery material. Any harm to the discoveree from discovery itself usually stems from the particular type of discovery sought.⁶⁰ The harm can be easily and accurately evaluated by the court because it is purely a function of the interaction between the discoveree and the discovery process.⁶¹ Thus, the court can question the discoveree to learn exactly how and why the particular discovery process will harm him. However, evaluation of the harm from disclosure of discovery requires speculation as to the danger that might result from the publication of the information obtained. This is a very difficult risk to predict,⁶² as compared to the more ascertainable harm resulting from the discovery process; harm from disclosure depends on the reactions of those receiving the information. To assess most accurately the harm from disclosure of secret information, the court theoretically would have to question all possible

57. See text accompanying notes 60-62 *infra*.

58. See text accompanying notes 112-19 and 167-88 *infra*.

59. Compare the good cause standard used in *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D. Mo. 1969), a case which involved a restriction on discovery itself, with *Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970), a case which involved a restriction on the disclosure of discovery. In *Apco*, the United States District Court for the Western District of Missouri denied plaintiff's request to restrict defendants' attempt to impose on plaintiff the task of examining a large number of documents, extracting the requested information therefrom, and compiling the information on the form requested by defendants' interrogatories. However, the court held that a restriction on the interrogatories could be imposed if the defendants in fact already possessed the evidence which would yield the answers to the interrogatories. 46 F.R.D. at 431. In *Williams*, the United States District Court for the Southern District of New York denied defendants' attempt to prohibit plaintiffs or their attorneys from disclosing any material obtained from defendants through discovery. The court held that, absent a showing that plaintiffs' attorneys were using the discovered information in bad faith, *e.g.*, to stir up litigation or to create improper publicity, no restriction on plaintiffs or on their attorneys would issue. 50 F.R.D. at 33. This bad faith requirement implies a stricter good cause standard for restrictions on disclosure of discovery. See also *Maritime Cinema Serv. Co. v. Movies En Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973); *Davis v. Romney*, 55 F.R.D. 337, 340 (E.D. Pa. 1972); *Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970); *Leoniam Amusement Co. v. Loew's, Inc.*, 18 F.R.D. 503 (S.D.N.Y. 1955).

But see *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 555 (N.D. Ill. 1964), where the court granted an order preventing discovery on the basis that trade secrets were sought, not on the claim that the multitude of interrogatories would be burdensome.

60. See text and accompanying note 36 *supra*.

61. *Id.*

62. See *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979); *United States v. Aluminum Co. of America*, 193 F. Supp. 249 (N.D.N.Y. 1960); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

recipients of the information about their expected reactions to such information. Of course, such an inquiry is impossible. Thus, to assist in evaluating the potential harm to the discoveree when the discoverer seeks to disclose discovered information, the courts have divided their analysis of this harm into two parts: the probability of the harm occurring⁶³ and the seriousness of the harm.⁶⁴

In one case analyzing the probability of the harm occurring, the United States District Court for the Southern District of New York⁶⁵ denied a protective order sought by the United States to prevent the defendant from obtaining sensitive business information which had been received in confidence by the Government from non-party manufacturers. The court denied the motion for the order on the ground that the proposed harm to the manufacturers, who were competitors of defendant, was too unlikely and too minimal.⁶⁶ Due to a lack of specific facts, the court rejected the manufacturers' allegations of competitive disadvantage⁶⁷ as unsubstantiated and noted that "[a]ny prejudice or harm to be occasioned by the companies answering the questionnaire seems more theoretical than practical."⁶⁸

In another case which analyzed the seriousness of the harm, the United States District Court for the Southern District of New York⁶⁹ required the showing of a "serious and clearly defined injury"⁷⁰ before granting an order prohibiting disclosure of discovery material. Again, the United States had received sensitive business information from defendant's competitors. When the defendant sought to discover this information, the competitors moved for a protective order. The court denied the motion because of the competitors' failure to show seriousness or likelihood of injury.⁷¹ The court reasoned that since the data would be introduced at trial where defendant would have an opportu-

63. See *United States v. Aluminum Co. of America*, 193 F. Supp. 249 (N.D.N.Y. 1960).

64. See *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

65. *United States v. Aluminum Co. of America*, 193 F. Supp. 249 (N.D.N.Y. 1960).

66. *Id.* at 250.

67. Although the motion for the order was made by the United States, each non-party manufacturer had an opportunity to voice its objection. Only two such companies objected. *Id.*

68. *Id.* See also *Apco Oil Co. v. Certified Transp., Inc.*, 46 F.R.D. 428 (W.D. Mo. 1969), where the court said: "It is not necessary to add that the burden of proof will rest upon plaintiff . . . and that the determination of whether good cause does or does not exist must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." *Id.* at 432. In *Sacks v. Frank H. Lee Co.*, 18 F.R.D. 500 (S.D.N.Y. 1955), the district court held that an attorney's affidavit that discovery will reveal secret formulas and trade secrets was insufficient as proof to warrant a protective order. *Accord*, *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971).

69. *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

70. *Id.* at 257.

71. *Id.*

nity to examine it then, there could be no additional harm to the competitors if the defendant obtained the information at the pretrial stage.⁷² The court therefore concluded the harm from pretrial disclosure was not serious enough to warrant a prohibition on the discovery.⁷³

The need for disclosure, which weighs against the harm to the discoveree in the good cause balancing test, is actually the need of two parties. A federal court weighs both the need of the discoverer to disclose and the need of the public to ascertain all relevant facts against the harm which may be caused to the discoveree.⁷⁴ The discoverer's need to disclose weighs heavily in the balancing test due to his first amendment right to unrestricted speech.⁷⁵ The first amendment is also designed to protect the public's access to free speech.⁷⁶ Thus, obtaining an order restricting disclosure of discovery material is more difficult than obtaining an order restricting discovery itself not only because of the difficulty in assessing the possible harm from restrictions on disclosure but also because of the first amendment interests involved.

Restrictions on Disclosure of Discovered Trade Secrets

The type of information most often sought to be restricted by rule 26(c) is trade secrets. The *Restatement of Torts* defines a trade secret as "information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know

72. *Id.* at 258. The court also noted that the information sought was not current, nor did it involve secret processes or customer lists which have traditionally enjoyed greater protection than most information. *Id.* at 257. See also *American Oil Co. v. Pennsylvania Petroleum Prods. Co.*, 23 F.R.D. 680 (D.R.I. 1959).

73. 193 F. Supp. at 258. It should be noted, however, that the court did restrict the disclosure of the information to the litigants for their use in the case. *Id.*

74. *Consolidated Box Co. v. United States*, 18 F.R. Serv. 2d 115 (Ct. Cl. 1973). The court in *Consolidated Box* stated that in ruling on a motion for a protective order against discovery of confidential information, "a federal court weighs the needs of the party seeking discovery and the public interest in ascertainment of all the relevant facts, on the one hand, against the harm which may be caused to the third person by disclosure of the confidential information." *Id.* at 121 (emphasis added).

75. See text accompanying notes 115-19 and 167-88 *infra*. Restrictions on discovery itself lack the first amendment interests bound up in restrictions on disclosure, because parties do not have a right of access to information not generally available to the public. *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979). See also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609-10 (1978); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). One court has explained that "[a] prohibition on what plaintiffs may say about information once they have obtained it, however, directly implicates the First Amendment." *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979). See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-38 (1978).

76. See generally *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

or use it."⁷⁷ The need for restrictions on disclosure of this type of information is reflected in a subsection of rule 26(c) which provides that a court may order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."⁷⁸ Although there have been attempts to restrict the disclosure of other types of discovery information,⁷⁹ the overwhelming majority of the cases involve trade secrets.

Various factors have been utilized by courts to determine whether a protective order should be granted to restrict the disclosure of trade secrets.⁸⁰ For example, in *United States v. IBM*,⁸¹ an antitrust suit seeking civil damages, the United States District Court for the Southern District of New York held that the alleged confidential information which the government sought to discover lacked secretive characteristics. The court stated that since there were no representations made that the information was not available to employees nor any allegations made of measures taken to guard the information's secrecy, the information could not be considered sufficiently secret to warrant a restric-

77. RESTATEMENT OF TORTS § 757 (1939) (not restated in Second Restatement since no change occurred in the law, see RESTATEMENT (SECOND) OF TORTS, Introductory Note at 1-2 (1965)). The Restatement lists as examples of trade secrets "a chemical compound, a process of manufacturing, treating or preserving materials, . . . or a list of customers." RESTATEMENT OF TORTS § 757, Comment b (1939). Thus, the definition of a trade secret, according to the Restatement, includes commercial information.

78. FED. R. CIV. P. 26(c)(7).

79. In *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), an order was sought to restrict disclosure of CIA documents concerning surveillance of Vietnam war protestors. See also *Alliance to End Repression v. Rochford*, 75 F.R.D. 431 (N.D. Ill. 1976), where, in a civil rights action brought against a federal agency, the court restricted the disclosure of documents.

80. See *Essex Wire Co. v. Eastern Elec. Co.*, 48 F.R.D. 308 (E.D. Pa. 1969) (the court allowed disclosure of alleged secret information since the information could easily be acquired through means other than discovery); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977) (considerations used by the court to determine if commercial information was secret enough to warrant a protective order restricting disclosure included: extent to which information is known to those outside and inside business; measures taken to guard secrecy of information; and value of information to business and its competitors); *Singer Mfg. Co. v. Brother Int'l Corp.*, 191 F. Supp. 322 (S.D.N.Y. 1960) (the court held that information of sales and price data was not rendered a trade secret merely due to the fact that plaintiff and defendant were competitors); *Moss v. Aetna Standard Eng. Co.*, 8 F.R.D. 323 (E.D.N.Y. 1948) (the court held that the name of the person supplying plaintiff with pins, bolts, dyes, and other material was not a trade secret).

The Restatement lists various factors to be considered in determining whether given information is secret:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by [those] involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 (1939).

81. 67 F.R.D. 40 (S.D.N.Y. 1975).

tion on its disclosure.⁸²

Determining whether information is a trade secret is crucial to applying the good cause standard of rule 26(c). Generally, the courts have not given trade secrets automatic and complete immunity against disclosure⁸³ but have weighed in each case a party's claim to privacy against the need for disclosure.⁸⁴ The party seeking a protective order to restrict disclosure of discovered trade secrets must show with specificity how such disclosure will result in harm.⁸⁵ This harm usually is couched in the rubric of "competitive disadvantage."⁸⁶ At times, courts have been so sensitive to the potential loss a litigant may suffer if required to produce valuable trade secrets that they have restricted discovery of the secrets altogether unless the party seeking discovery established that the information was sufficiently relevant and necessary to his case to outweigh the harm discovery would cause to the discoveree.⁸⁷ Once relevancy and necessity have been established, the courts have imposed substantial restrictions on the disclosure of valuable trade secrets.⁸⁸

Protective orders against disclosure of discovered trade secrets generally are sought in either patent cases⁸⁹ or antitrust cases.⁹⁰ Given

82. *Id.* at 49.

83. The common law tradition is to afford protection to trade secrets. *E.I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917). The reason for this is that the existence and ownership of a trade secret is a property right which results in a valuable competitive advantage. *Speedry Chem. Prods., Inc. v. Carter's Ink Co.*, 306 F.2d 328 (2d Cir. 1962); *Farrand Optical Co. v. United States*, 175 F. Supp. 230 (S.D.N.Y. 1959). To disclose the secret is to destroy the property right. *John T. Lloyd Laboratories, Inc. v. Lloyd Bros. Pharm.*, 131 F.2d 703 (6th Cir. 1942).

Secret processes and customer lists have been given special protection. *United States v. American Optical Co.*, 39 F.R.D. 580, 586 (N.D. Cal. 1966); *American Oil Co. v. Pennsylvania Petroleum Prod. Co.*, 23 F.R.D. 680 (D.R.I. 1959).

84. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F. Supp. 856 (S.D.N.Y. 1964).

Although trade secrets embody commercial information, some courts see more harm emanating from the disclosure of traditional trade secrets. As one court put it, "disclosure of secret formulas will almost invariably result in this injury, . . . but the disclosure of two-and-a-half-year-old sales data will not." *United States v. IBM*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

85. *United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975).

86. *See, e.g., Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1970); *Essex Wire Co. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969).

87. *Hartley Pen Co. v. United States Dist. Court*, 287 F.2d 324, 331 (9th Cir. 1961); *Corbett v. Free Press Ass'n*, 50 F.R.D. 179 (D. Vt. 1970); *Struthers Scientific & Int'l Corp. v. General Foods Corp.*, 45 F.R.D. 375, 378 (S.D. Tex. 1968).

88. *See* text accompanying notes 96-110 *infra*.

89. *See, e.g., Cleo Wrap Corp. v. Elsner Eng'r Works, Inc.*, 59 F.R.D. 386 (M.D. Pa. 1972); *Great Lakes Carbon Corp. v. Continental Oil Co.*, 23 F.R.D. 33 (W.D. La. 1958). *See also Tactical Use and Abuse*, *supra* note 3, at 137.

90. *See, e.g., Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *United*

the substantial property interests in patent information and the fact that disclosure of such technical information is not necessary for the public's welfare, a strong argument can be made for using a less strict good cause standard in patent cases.⁹¹ Accordingly, courts have been more willing to grant orders restricting disclosure of patent information.⁹² On the other hand, information on antitrust violations is eminently important to the public's welfare because the public, as consumers, will generally pay higher prices when buying products from antitrust law violators.⁹³ Recognizing this, Congress enacted section 137 of the Publicity in Taking Evidence Act,⁹⁴ which requires the discovery process in antitrust litigation to be held in public. Consequently, a stricter good cause standard than that applied in patent cases has been applied to protective orders which seek to restrict trade secrets discovered in antitrust litigation.⁹⁵

There are several ways to limit the disclosure of secrets. One such limitation on discovery is the *in camera* proceeding.⁹⁶ This proceeding allows a judge to examine the discovered information in private before

States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1975); *Maritime Cinema Serv. Co. v. Movies En Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

91. See *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971), where the court, ruling on a protective order sought to restrict discovery of financial records, distinguished patents from commercial information, indicating patents deserve more protection.

92. See *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963), where the court granted a protective order in a patent infringement action even though defendant had not substantiated its allegations as to the existence of trade secrets; see also *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973); *Struthers Scientific & Int'l Corp. v. General Foods Corp.*, 45 F.R.D. 375 (S.D. Tex. 1968).

It is notable that issued patents become public information and thus enjoy no confidentiality whatsoever. *Camco, Inc. v. Baker Oil Tools, Inc.*, 45 F.R.D. 384 (S.D. Tex. 1968). The patent information involved in restriction requests includes patent applications, studies, and construction. See *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973); *Struthers Scientific & Int'l Corp. v. General Foods Corp.*, 45 F.R.D. 375 (S.D. Tex. 1968).

93. See *Standard Oil Co. v. United States*, 221 U.S. 1, 50-58 (1911), where the Court stated the specific evils of monopoly as the ability to fix prices, the ability to limit production, and the deterioration in the quality of the monopoly product; see also *United States v. Aluminum Co. of America*, 193 F. Supp. 249, 250 (N.D.N.Y. 1960), where the court said the purpose of an antitrust action "is to protect the public interest which definitely includes the interest of defendant's competitors."

94. 15 U.S.C. § 30 (1976).

95. *United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975); *Maritime Cinema Serv. Co. v. Movies En Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973); *United States v. American Optical Co.*, 39 F.R.D. 580, 586 (N.D. Cal. 1966); *United States v. Lever Bros.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

Commercial information in actions other than antitrust has enjoyed protections similar to patents. See *Everco Indus., Inc. v. O.E.M. Prods. Co.*, 362 F. Supp. 204 (N.D. Ill. 1973) (no discovery of contracts and communications); *Corbett v. Free Press Ass'n*, 50 F.R.D. 179 (D. Vt. 1970) (no discovery of net profit figures).

96. See *Kerr v. United States Dist. Court*, 426 U.S. 394, 404-06 (1976); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977); *United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975).

determining whether to issue an order restraining disclosure. The party seeking in camera discovery must show good cause for such treatment.⁹⁷ This showing of good cause parallels that required for any other order restricting disclosure of discovery material: the party must show that disclosure will result in a clearly defined, serious injury to the person or corporation from which information is sought.⁹⁸

Another common limitation placed on the disclosure of discovered trade secrets is to restrict the use of discovery material to the discoverer's counsel for the pending litigation only. This limitation has been granted where the information sought included patent studies and applications concerning the characteristics of a steam iron,⁹⁹ and identification of a process to freeze dry food.¹⁰⁰ The desire to protect commercial information from disclosure motivated one court to grant this restriction where the information sought consisted of financial records, books and records concerning loan agreements, and merger talks and records concerning privately financed research.¹⁰¹ Other commercial information which courts have similarly limited includes internal marketing information¹⁰² and information relating to competitive pricing and customers.¹⁰³

Other restrictions preventing disclosure of trade secrets include requiring the party receiving the documents to specify the names of those persons who will inspect the documents, as well as the time and manner of inspection.¹⁰⁴ The rule 26(c) provisions allowing for sealing the discovered information by the court until the restriction is no longer needed are also used frequently.¹⁰⁵ Once a deposition is sealed, it can be opened only by order of the court.¹⁰⁶ Such orders sealing confiden-

97. See, e.g., *United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975).

98. *Id.* at 46. Both parties and their counsel should be permitted to participate in such in camera proceedings so that the judge will benefit from an adversarial presentation. See *United States v. Nixon*, 418 U.S. 683, 715-21 (1974); *Black v. Sheraton Co. of America*, 564 F.2d 531, 544-45 (D.C. Cir. 1977); *Dellums v. Powell*, 561 F.2d 242, 251 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977).

99. *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973).

100. *Struthers Scientific & Int'l Co. v. General Foods Co.*, 45 F.R.D. 375 (S.D. Tex. 1968).

101. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971).

102. *Metal Foil Prods. Mfg. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491 (E.D. Va. 1972) (advertising budgets).

103. *National Utility Serv., Inc. v. Wisconsin Centrifugal Foundry, Inc.*, 49 F.R.D. 30 (E.D. Wis. 1970).

104. See *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963); *Louis Weinberg Assoc. v. Monte Christi Corp.*, 11 F.R.D. 514 (S.D.N.Y. 1951).

105. FED. R. CIV. P. 26(c)(6)-(c)(8). In ordering a deposition sealed, a court normally prohibits the parties and attorneys from making any disclosure of its contents to any third party. C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2042 (1970).

106. FED. R. CIV. P. 26(c)(6)-(c)(8).

tial discovered information have been granted where the discovery obtained would give valuable business information to competitors,¹⁰⁷ could be used in a related criminal proceeding,¹⁰⁸ or concerned the discoveree's illegal conduct and could create harmful publicity to the discoveree even though it might not be relevant at trial.¹⁰⁹ Yet another method used at times to limit disclosure of confidential information is the postponement of discovery until trial so that the relevancy of the information sought can be seen more clearly.¹¹⁰

Thus, trade secrets traditionally have enjoyed substantial protection from disclosure. The courts continue to protect these secrets in patent cases. However, apparently due to congressional action prompted by a concern for the public's welfare, the courts have applied a stricter good cause standard to orders restricting disclosure of information discovered in antitrust proceedings. The recent cases striking down restrictions on disclosure of discovery as unconstitutional have not involved trade secrets and do not appear to change the law applied to cases involving trade secrets.¹¹¹

THE CONSTITUTIONALITY OF RESTRICTIONS ON DISCLOSURE OF INFORMATION OBTAINED THROUGH DISCOVERY

Participants in the judicial process retain their first amendment freedom of speech rights,¹¹² which apply to discovery materials.¹¹³ Protective orders prohibiting the disclosure of discovery information

107. See *Marshwood Co. v. Jamie Mills, Inc.*, 10 F.R.D. 386 (N.D. Ohio 1950).

108. See *D'Ippolito v. American Oil Co.*, 272 F. Supp. 310 (S.D.N.Y. 1967).

109. See *Nichols v. Philadelphia Tribune Co.*, 22 F.R.D. 89 (E.D. Pa. 1958).

110. See *Lever Bros. v. Proctor & Gamble Mfg. Co.*, 38 F. Supp. 680 (D. Md. 1941). The court held that the trade secrets (a soap-making process) should not be discovered until the evidence at the trial indicated the relevancy of such information. Otherwise, the court said, a great harm might occur to the moving party at a time when the relevancy of the information to the case is still uncertain. *Id.* at 683. See also *Ray v. Allied Chem. Corp.*, 34 F.R.D. 456 (S.D.N.Y. 1964) (the court held information on development and process of ureaformaldehyde foams subject to the limitation); *DeLong Co. v. Lucas*, 138 F. Supp. 805 (S.D.N.Y. 1956) (the court granted the pre-trial limitation on discovery in a breach of a "no competition" contract suit where the information sought consisted of patent applications and work concerning development of over-water structures); *International Nickel Co. v. Ford Motor Co.*, 15 F.R.D. 392 (S.D.N.Y. 1954) (the court granted the pre-trial limitation in a patent infringement suit where discoverer requested defendant's analysis of molten metal at various stages in casting of crank shafts).

111. See *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

112. See *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

113. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *International Prods. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977); *Davis v. Romney*, 55 F.R.D. 337, 344-45 (E.D. Pa. 1972).

constitute restrictions on the guarantee of free speech.¹¹⁴ Thus, the constitutionality of such restrictions must be evaluated before a protective order may be issued.

Restrictions on the disclosure of discovery material may constitute a prior restraint on the freedom of speech.¹¹⁵ Restraints which in effect censor speech before it is made are regarded by the United States Supreme Court as "the most serious and least tolerable infringement on First Amendment rights."¹¹⁶ Consequently, while prior restraints are not unconstitutional per se,¹¹⁷ there is a "heavy presumption" against their validity.¹¹⁸ The fact that an order which restricts disclosure poses many of the dangers of a prior restraint should be sufficient to require close scrutiny of its impact on protected first amendment speech.¹¹⁹

The view that restrictions on the disclosure of discovery material must be scrutinized closely to protect first amendment rights has surfaced only recently. Prior to 1977, two federal circuit courts of appeals in three cases held that the first amendment's protection did not apply as rigorously to restrictions on the disclosure of information obtained through discovery as it did to restrictions on the disclosure of information obtained otherwise.¹²⁰ As a result, these courts applied the rule

114. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

115. *In re Halkin*, 598 F.2d 176, 183-86 (D.C. Cir. 1979). "The term 'prior restraint,' at common law, referred to a system of unreviewable administrative censorship or licensing." *Id.* at 183. See *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389-90 (1973); *Near v. Minnesota*, 283 U.S. 697, 713-15 (1931). The United States Supreme Court has extended the meaning of prior restraints to include judicial orders. *Near v. Minnesota*, 283 U.S. 697 (1931). Among the judicial orders that have been considered, prior restraints are those restraining extrajudicial comment about a pending trial. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970). See generally *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* §§ 12-31 to 12-33 (1978) [hereinafter referred to as *TRIBE*].

116. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

117. Whether a protective order restricting disclosure of discovery material may be deemed a prior restraint is not dispositive of the constitutionality of such an order. "[T]he term 'prior restraint' should not be used as 'a talismanic test.'" *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979), quoting *Frankfurter, J.*, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

118. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). See also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (the Court held an injunction against publication by the New York Times of the contents of a classified government study unconstitutional as a prior restraint on first amendment rights); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (an injunction to suppress the distribution of literature of any kind in plaintiff's suburb was held unconstitutional as a prior restraint on first amendment rights).

119. *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979).

120. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *International Prods. Co. v. Koons*, 325 F.2d 403 (2d Cir. 1963); *Parker v. Columbia Broadcasting System, Inc.*, 320 F.2d 937 (2d Cir. 1963). These courts did agree that the first amendment applied to restrictions on the disclosure of discovered information. They felt, however, that satisfaction of the good cause standard found in rule 26(c) would validate the restrictions' constitutionality. This view derives from the notion of the court's power over its own process. See *Gumbel v. Pitkin*, 124 U.S. 131,

26(c) good cause standard to restrictions on the disclosure of discovery material, while applying the United States Supreme Court's strict first amendment "clear and present danger" standard¹²¹ to restrictions on the disclosure of other information.

Parker v. Columbia Broadcasting System, Inc.

In *Parker v. Columbia Broadcasting System, Inc.*,¹²² the plaintiff shareholder attempted to set aside the results of an annual stockholders' meeting. Plaintiff moved for judgment on the pleadings. In support of her motion, she filed an unsworn memo alleging fraud and misconduct by defendant and its counsel.¹²³ This memo contained information obtained through discovery. The federal district court ordered plaintiff to show cause why her memo should not be stricken. The court also enjoined plaintiff and her agents from disseminating outside of court any or all portions of the memo she had submitted and from communicating any information it contained.¹²⁴

The United States Court of Appeals for the Second Circuit decided that the order enjoining dissemination of plaintiff's memo "was properly issued under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice.'" ¹²⁵ However, the Second Circuit struck that part of the lower court's order which barred communication of information found within the memo because such an order "is repugnant to the First Amendment to the Constitution."¹²⁶

Thus, the *Parker* court applied a liberal standard to uphold restrictions on the dissemination of discovery documents but applied the much stricter constitutional standard to strike down restrictions on the communication of information found in the documents.¹²⁷ Evidently,

144 (1888); *International Prods. Co. v. Koons*, 325 F.2d 403, 408 (2d Cir. 1963); *Parker v. Columbia Broadcasting System, Inc.*, 320 F.2d 937, 938 (2d Cir. 1963); *Corbett v. Free Press Ass'n*, 50 F.R.D. 179, 181 (D. Vt. 1970).

121. The "clear and present danger" standard provides protection for speech unless such speech creates a clear and present danger of bringing about a substantial evil which the government has the power to prohibit. *Associated Press v. United States*, 326 U.S. 1, 7 (1945). See text accompanying notes 115-19 *supra*; *TRIBE*, *supra* note 115, at §§ 12-9 to 12-11.

122. 320 F.2d 937 (2d Cir. 1963).

123. *Id.* at 938.

124. *Id.*

125. *Id.*, citing *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

126. 320 F.2d at 939.

127. This distinction probably stems partly from the United States Supreme Court's opinion that prohibition of extrajudicial statements concerning pending litigation should be judged against the first amendment's strict "clear and present danger" standard. See text and accompanying note 190 *infra*.

the *Parker* court read the power of a trial court over its discovery process to be so extensive as to allow that court to eliminate in effect a party's first amendment right to distribute documents involved in the litigation, regardless of whether those documents contained secret information.¹²⁸

International Products Corp. v. Koons

The notion that the first amendment is rendered impotent when confronted by a trial court's restrictions on the disclosure of documents involved in the discovery process was further refined in *International Products Corp. v. Koons*,¹²⁹ another Second Circuit case. *Koons* involved a suit by a corporation against its former president for mismanagement and other fiduciary breaches. The current president of the corporation was deposed by defendant Koons to discover information concerning payments by the corporation to a foreign government official. Subsequently, the federal district court granted the motion for a protective order to enjoin Koons from publicizing any matter contained or referred to in the deposition.¹³⁰

The Second Circuit endorsed "the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes."¹³¹ The court held unconstitutional that part of the order which restricted the dissemination of information Koons had possessed prior to discovery.¹³² However, the court upheld the sealing of all affidavits submitted by defendants on various motions, although they were not obtained through discovery. Thus, the rule of *Koons* is that requests for restrictions on the disclosure of information either obtained through discovery or contained in papers filed with the court will be judged against rule 26(c)'s good cause standard, while attempts to re-

128. None of the cases cited by *Parker* as authority for the power of its own process concern a conflict between the court's power and a constitutional right. See *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888) (the court ordered a United States Marshal to restore defendant debtor's property to a civil sheriff so that the property could be sold under petitioner's writ of execution); *Pueblo de Taos v. Archuleta*, 64 F.2d 807, 813 (10th Cir. 1933) (the court dismissed a suit not brought for the purpose of obtaining a judicial determination, but for the purpose of influencing Congress); *Rudnicki v. McCormack*, 210 F. Supp. 905, 908-12 (D.R.I. 1962) (the court enjoined repetitious and baseless litigation); *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953) (the court dismissed a suit in which the complaint contained numerous allegations of a libelous, scandalous, vituperative, and impertinent nature).

129. 325 F.2d 403 (2d Cir. 1963).

130. *Id.* at 404 n.1. For the text of rule 26(c), which allows for protective orders, see note 4 *supra*.

131. 325 F.2d 403 at 407.

132. *Id.* at 408-09.

strict the disclosure of all other information will be subject to the strict scrutiny standard of the first amendment.¹³³

Justification for applying the good cause standard to the sealed affidavits which had not been obtained through discovery lies in the court's inherent power over its own process.¹³⁴ According to the court, the affidavits submitted by Koons acquired a "quasi-official appearance" which would encourage newspapers to publish them under their privilege to report judicial proceedings.¹³⁵ The court also believed that the quasi-official appearance of the affidavits might give them undeserved credibility with the public.¹³⁶ To prevent such potential misrepresentations, the court exercised its inherent powers to prohibit publication of the affidavits. Such powers, according to the court, could not be exercised over other information possessed prior to discovery because such information was not submitted to the court but rather had been used merely to argue on motion.¹³⁷ Thus, the *Koons* court followed *Parker* by upholding a restriction on the disclosure of any information involved in the court's process. *Koons*, therefore, reaffirmed the Second Circuit's subordination of the first amendment to a court's inherent power over its process.¹³⁸

Rodgers v. United States Steel Corp.

The third case to decide the proper standard to apply to restrictions on disclosure of discovery was *Rodgers v. United States Steel Corp.*,¹³⁹ decided in 1976 by the United States Court of Appeals for the Third Circuit. *Rodgers* was a class action suit filed by a group of people injured by defendant's discriminatory employment policies. A suit by the federal government against the defendant on the same charges¹⁴⁰ had resulted in a consent decree requiring the defendant to distribute over \$30 million in back pay.¹⁴¹ The plaintiffs in the class action suit asked for a hearing to determine whether the settlement in the consent decree was fair and adequate. In connection with this hearing, plaintiffs deposed an attorney of the Justice Department who had

133. *Id.* at 407-08.

134. *Id.*

135. *Id.* at 408.

136. *Id.*

137. *Id.*

138. *Id.*

139. 536 F.2d 1001 (3d Cir. 1976).

140. *United States v. Allegheny-Ludlum Indus.*, 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

141. 536 F.2d at 1003.

negotiated the consent decree to obtain information on how the back pay fund had been calculated. After trying unsuccessfully to prevent the deposition, the United States obtained a protective order prohibiting disclosure of the information contained in the deposition. The order also prohibited dissemination of a document, known as exhibit 3, which had not been obtained through discovery, but which contained information similar to that found in the deposition. Plaintiffs appealed and sought a writ of mandamus¹⁴² directing the lower court to vacate that protective order.

The Third Circuit held that restrictions on the disclosure of information obtained in a manner other than through the court's process are valid only if they can withstand the rigorous standards by which prior restraints of speech are judged.¹⁴³ However, restrictions on disclosure of information obtained through, rather than merely involved in, the court's process were permitted. Thus, the court concluded that the deposition could not be disclosed but that exhibit 3 could be.¹⁴⁴

Unlike *Parker* and *Koons*, *Rodgers* specifically defined the constitutional standard applied to restrictions on nondiscovery information. That standard is the same one used to evaluate prior restraints on speech.¹⁴⁵ The *Rodgers* court stated that "[w]hile a prior restraint is not unconstitutional per se, it comes to this court bearing a heavy presumption against its constitutionality."¹⁴⁶ According to *Rodgers*, there exist two ways for an order to avoid the rigors of such a standard: (1) the prior restraint must either fall within one of the narrowly defined exceptions to the prohibition against prior restraints,¹⁴⁷ and must have

142. Mandamus is a writ which issues from a court of superior jurisdiction and is directed to an inferior court, commanding the performance of a particular act specified within the writ. *United States v. Boutwell*, 84 U.S. (17 Wall.) 604 (1873). United States Courts of Appeals are empowered to issue such writs. All Writs Act, 28 U.S.C. § 1651(a) (1976). Although mandamus is a drastic remedy, "to be invoked only in extraordinary situations," *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976), it has been used by a number of courts to strike down orders which contain similar restraints. See, e.g., *In re Halkin* 598 F.2d 176 (D.C. Cir. 1979); *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), cert. denied, 434 U.S. 985 (1977); *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975); *Chase v. Robson*, 435 F.2d 1059, 1062 (7th Cir. 1970). Mandamus is an especially appropriate remedy for these types of cases because timeliness is important to the rights of expression protected by the first amendment. *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1976). See generally Comment, *The Expanding Use of Mandamus to Review Texas District Court Discovery Orders: An Immediate Appeal is Available*, 32 Sw. L.J. 1283 (1979); Comment, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 1377 (1976); Note, *Civil Procedure—Mandamus—Review of a Discovery Order Under Federal Rule of Civil Procedure 30(b)(4)*, 22 WAYNE L. REV. 179 (1975).

143. 536 F.2d at 1007.

144. *Id.*

145. *Id.*

146. *Id.* See note 115 *supra*.

147. *Id.* Three of these exceptions were laid out in *New Jersey State Lottery Comm'n v.*

been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech;¹⁴⁸ or (2) the "disclosure of information concerning pending litigation by the parties or their counsel would present a clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice."¹⁴⁹

Rodgers concluded that the order at hand, insofar as it restricted the disclosure of exhibit 3, did not fall within any of the narrowly defined exceptions to the prohibition against prior restraints. In the absence of any showing that disclosure of the methodology employed to calculate the back pay proposal would pose a serious and imminent threat, the court decided that the clear and present danger exception to the prohibition against prior restraints did not apply despite defendant's assertion that the public policy in favor of informal settlements in employment discrimination cases would be seriously undermined.¹⁵⁰ Thus, the court denied the order restricting disclosure of exhibit 3.

Analogous Supreme Court Decisions

The United States Supreme Court has not decided directly the relationship of the first amendment's guarantee of free speech to restrictions on disclosure of discovered information. However, recent Supreme Court decisions have considered the argument that the source of information or the manner of its acquisition determines the presence or absence of first amendment protection. The Court has also considered the waiver argument relied upon in *Rodgers* and *Koons* which contends that parties to the discovery process implicitly waive any first amendment protection in the discovered information.

In *First National Bank v. Bellotti*,¹⁵¹ certain corporations challenged the constitutionality of a Massachusetts criminal statute which prohibited them from spending money to publicize their views on a

United States, 491 F.2d 219 (3d Cir. 1974), *vacated on other grounds*, 420 U.S. 371 (1975). The court said:

One is that the information is of such nature that it is not protected by the first amendment. The second is that although the information ordinarily is protected by the first amendment, the agency applying the restraint is exempt from its strictures. The third is that although the information is protected and the agency is not exempt from the first amendment, the restraint is only reasonably incidental to the achievement of another valid governmental purpose.

491 F.2d at 222 (citations omitted).

148. *Id.* See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

149. 536 F.2d at 1008. See note 121 *supra*.

150. *Id.*

151. 435 U.S. 765 (1978).

proposed constitutional amendment that would have permitted the legislature to impose a graduated personal income tax. The Court held that the statute violated the first amendment, disregarding the state's argument that the speech emanated from a corporation other than one engaged in the communications business and, therefore, was unprotected by the first amendment.¹⁵²

The Court reasoned that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." ¹⁵³ Rather, the speech is protected because it furthers the societal interest in the free flow of information.¹⁵⁴ That the information in *Bellotti* was commercial was a factor in the Court's assessment of the furtherance of societal interests.¹⁵⁵

While *Bellotti* is authority for the proposition that the identity of the source of information does not determine first amendment protection, *New York Times Co. v. United States*¹⁵⁶ addressed the manner of acquisition and held that disclosure even of information that was obtained by theft is protected by the first amendment. In *New York Times*, the Court held that it was unconstitutional to enjoin publication by the New York Times and the Washington Post of the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The study had been obtained from an unknown person in violation of a federal criminal statute which prohibited passing sensitive information relating to national defense.¹⁵⁷ Despite the fact that the study had been obtained illegally, the Court upheld the newspapers' first amendment right to disclose the documents on the grounds that the Government failed to show proper justification for the imposition of a prior restraint of expression.¹⁵⁸ Thus, Supreme Court

152. *Id.* at 767.

153. *Id.* at 777. See also *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979).

154. 435 U.S. at 783. The Court cited *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), as precedent for this holding. The Court in *Virginia Pharmacy* held that a Virginia statute which prohibited the advertising of the prices of prescription drugs violated the first amendment's protection of free speech. The Court disregarded Virginia's argument that the speech was commercial and, therefore, according to the commercial speech doctrine, unprotected by the first amendment. The Court reasoned that the focus of first amendment analysis should not be placed on whether the speech is commercial but rather on the degree to which the expression furthers the societal interest in the free flow of information. *Id.* at 764.

155. 435 U.S. at 777. See also *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976).

156. 403 U.S. 713 (1971).

157. *Id.* at 745 (Marshall, J., concurring).

158. *Id.* at 718-19 (Black, J., concurring). See also *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), where the court held that a former CIA employee has first amendment rights in the dissemination of unclassified information retained in violation of a secrecy oath.

decisions offer little support for the emphasis placed on the source of the information by *Parker*, *Koons*, and *Rodgers*.

Another rationale found in both *Rodgers* and *Koons*¹⁵⁹ to prevent the application of the first amendment's protections to restrictions on disclosure of discovery is waiver. *Rodgers* expands on *Koons* to suggest that "the parties and counsel, by taking advantage of or a part in the discovery processes, implicitly waive their first amendment rights freely to disclose or disseminate the information obtained through those processes."¹⁶⁰ However, according to the United States Supreme Court, the idea that a party waives his first amendment right to disclose discovery information is clearly untenable. In various criminal cases, the United States Supreme Court has held that waiver of constitutional rights is not to be inferred lightly.¹⁶¹ The Court has expressed disapproval of waiver of first amendment rights in civil suits as well.¹⁶²

In *Curtis Publishing Co. v. Butts*,¹⁶³ a civil diversity suit involving a libel action, the Supreme Court held that waivers of first amendment rights are to be inferred only in "clear and compelling" circumstances. In *Butts*, a university football coach sued defendant for publishing an article accusing him of conspiring to "fix" a football game. Unaware of a recent Court decision granting defendants greater first amendment protection from state libel claims,¹⁶⁴ Curtis defended only on the basis of state libel law. Upon notice of the relevant Supreme Court decision,

159. See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *International Prods. Co. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

160. 536 F.2d at 1006.

161. See *Emspak v. United States*, 349 U.S. 190, 196 (1955) (no waiver of privilege against self-incrimination); *Smith v. United States*, 337 U.S. 137, 150 (1949) (petitioner's immunity from prosecution on the facts to which he was compelled to testify was not waived by a subsequent voluntary statement); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (no waiver of right to counsel absent showing of intentional relinquishment of a known right); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (no waiver of right to jury trial); *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (no waiver of right to jury trial).

162. See *Perry v. Sinderman*, 408 U.S. 593 (1972); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). In *Perry*, the United States Supreme Court indicated its disapproval of a court order which conditions a privilege of access on a waiver of first amendment rights when it noted that:

even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly" Such interference with constitutional rights is impermissible.

408 U.S. at 597, citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

163. 388 U.S. 130 (1967).

164. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Curtis promptly argued the constitutional issue. Butts, however, contended that Curtis waived its newly discovered first amendment right by failing to assert such a right before trial. The Court held that Curtis had not implicitly waived its first amendment right to publish the article absent a showing of clear and compelling circumstances. The Court stated:

[T]he constitutional protection which is claimed to have been waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom". . . . Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.¹⁶⁵

It could hardly be said that *Rodgers* or *Koons* contained such clear and compelling circumstances as are required to overcome the strong presumption against waiver of first amendment rights. *Koons* was simply a corporate mismanagement case and *Rodgers* an ordinary employment discrimination suit. In fact, the *Rodgers* court admitted the absence of clear and compelling circumstances when it denied that plaintiffs waived their first amendment right to disclose exhibit 3, the document which had not been obtained through discovery.¹⁶⁶ For the *Rodgers* court to argue that clear and compelling circumstances suddenly appear when disclosure of discovery information is involved would be totally inconsistent. Thus, in *Rodgers* and *Koons*, the absence of clear and compelling circumstances would preclude any presumption that the parties waived their first amendment rights.

CLOSER SCRUTINY OF A FIRST AMENDMENT RIGHT TO DISCLOSE DISCOVERED INFORMATION

Reliance Insurance Co. v. Barron's

Two recent cases have rejected as incorrect the distinction drawn in the *Parker-Koons-Rodgers* trilogy.¹⁶⁷ They conclude that the first amendment standard for judging prior restraints should be applied to all protective orders which restrict the disclosure of information, regardless of the source of the information. In *Reliance Insurance Co. v. Barron's*,¹⁶⁸ plaintiff brought suit in the United States District Court for the Southern District of New York against a financial newspaper which had published an article that allegedly defamed the plaintiff by

165. 388 U.S. at 145 (citations omitted).

166. 536 F.2d at 1007 n.14.

167. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

168. 428 F. Supp. 200 (S.D.N.Y. 1977).

labeling his business practices as showing "bad business judgment."¹⁶⁹ When the newspaper tried to discover various information from plaintiff company, including numerous internal documents and records evidencing Reliance's accounting practices, plaintiff sought a protective order to forbid disclosure of the information to all but defendant's attorneys. In addition, the proposed order forbade the use of the information in any articles and books, except to the extent that the information was of public record.

The district court denied plaintiff a protective order after determining that plaintiff had failed to show sufficient expected harm to meet rule 26(c)'s good cause standard.¹⁷⁰ The court then proceeded to apply the first amendment standard to the order to determine whether plaintiff could at least require that the contested documents be submitted under seal for an in camera inspection.¹⁷¹ In doing so, the *Barron's* court had discarded the *Parker-Koons-Rodgers*' distinction between restrictions on the disclosure of information obtained through discovery and information obtained otherwise by reasoning that it would be impracticable, if not impossible, to determine whether published information, claimed to be within the protective order, was obtained in violation of the order or obtained through other means.¹⁷²

The constitutional standard applied by the *Barron's* court to the order is defined as a requirement that the moving party "demonstrate that the material to be restrained is, indeed, confidential, and that its publication would cause plaintiff to suffer serious and irreparable injury."¹⁷³ The court found that plaintiff had failed to show the requisite injury and consequently denied his motion for a protective order.

169. *Id.* at 201.

170. Plaintiff simply offered in support of its motion affidavits prepared by its attorneys. The court held that the allegations contained in the affidavits failed to show that the discovery was confidential or that harm would result. *Id.* at 204. See note 68 *supra*.

171. *Id.* at 204. For a discussion of in camera inspection, see text accompanying notes 96-98 *supra*.

172. 428 F. Supp. at 205.

173. *Id.* at 204. Although the language of the *Barron's* standard differs somewhat from the language of the constitutional standard enunciated in *Rodgers* that there be a "clear and present danger," the two are parallel in substance. Both require a very explicit showing that substantial injury will result from the disclosure of information before allowing restrictions on such disclosure. Thus, *Rodgers* and *Barron's* do not differ in the constitutional standard they apply to restrictions on the disclosure of information. Rather, they differ in their determination of whether to apply such a standard to all disclosure restrictions or merely to those restrictions on disclosure of non-discovery material. See *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976).

In re Halkin

Recently, the United States Court of Appeals for the District of Columbia Circuit decided the constitutionality of protective orders which seek to restrict the disclosure of discovery information. *In re Halkin*¹⁷⁴ involved a suit by a number of individuals alleging that certain government agencies, principally the Central Intelligence Agency and the National Security Agency, conducted unlawful programs of surveillance of United States citizens who opposed the Vietnam war.¹⁷⁵ During discovery, the plaintiffs received from the CIA documents concerning the surveillance programs. Plaintiffs then gave written notice to the CIA that they planned to release these documents to the press.¹⁷⁶ In response, the defendants obtained a protective order under rule 26(c) which prohibited dissemination or disclosure of any documents or information not of public record. Plaintiffs petitioned for a writ of mandamus to vacate the district court's order.¹⁷⁷ The District of Columbia Circuit concluded that the order was unconstitutional when judged against a standard similar to that used for prior restraints of speech,¹⁷⁸ despite the CIA's claim that an unfair trial would result from the disclosure.

Reasoning of the Court

The court in *Halkin* expressly rejected the distinction drawn in *Parker, Koons, and Rodgers*.¹⁷⁹ In doing so, the court relied on *First National Bank v. Bellotti*¹⁸⁰ to determine that the extent of first amendment protection granted to speech does not depend on how or where the information was acquired.¹⁸¹ The court thus concluded that application of the strict constitutional standard would not be foreclosed by the fact that the information to be disclosed was acquired through the discovery process.¹⁸²

174. 598 F.2d 176 (D.C. Cir. 1979).

175. The Central Intelligence Agency is hereinafter referred to as the CIA.

176. 598 F.2d at 181.

177. *Id.* at 182.

178. *Id.* at 197.

179. *See id.* at 187-89.

180. 435 U.S. 765 (1978).

181. 598 F.2d at 187.

182. For a critical discussion of the *Halkin* court's reliance on *Bellotti*, see Comment, *The First Amendment Right to Disseminate Discovery Materials: In re Halkin*, 92 HARV. L. REV. 1550 (1979) [hereinafter referred to as *First Amendment Right*]. The author suggests that *Halkin* improperly relied on *Bellotti* to discount completely the source of the speech as a factor in evaluating first amendment protection of the speech. *Id.* at 1555. See also Comment, 48 U. CIN. L. REV. 900 (1979).

The court's application of the first amendment standard to the restrictions imposed in *Halkin* resulted from its view that the order "constitutes direct governmental action limiting speech."¹⁸³ Plaintiffs argued that the order constituted a prior restraint.¹⁸⁴ Although conceding that a rule 26(c) order restricting disclosure of discovery information is a very narrow prior restraint since it is limited to specific expression,¹⁸⁵ the *Halkin* court concluded that the order is similar enough to a prior restraint "to require close scrutiny of its impact on protected First Amendment expression."¹⁸⁶ Relying generally on the notion that litigation is a public proceeding¹⁸⁷ and specifically on cases holding unconstitutional orders that restrain extrajudicial comment by parties and lawyers,¹⁸⁸ the majority of the court concluded that the first amendment standard should be applied to the order at hand.

The majority opinion then focused on the proper constitutional standard to be used. According to the *Halkin* court, once a trial court determines the nature of the protective order's restraint on expression, it "must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression."¹⁸⁹

The first criterion, that the harm must be substantial and serious, is one that has been used in a line of decisions known as the *Fair Trial v. Free Speech* cases which deal with the first amendment's application to extrajudicial statements in general.¹⁹⁰ This criterion is more commonly

183. 598 F.2d at 183.

184. For a discussion of prior restraints, see text accompanying notes 115-19 *supra*.

185. *In re Halkin*, 598 F.2d 176, 185 n.17 (D.C. Cir. 1979).

186. *Id.* at 186.

187. *Id.* at 187. But see *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), where the Court excluded the public and the press from a pretrial suppression hearing in a murder prosecution. The *Gannett* Court seems to disfavor the publicizing of pretrial proceedings. However, the Court was quick to point out that it decided only the narrow issue of whether the Constitution requires that a pretrial hearing for a motion to suppress evidence be opened to the public, although all the participants in the litigation agreed to protect the defendants' fair trial rights. *Id.* at 393-94. Indeed, the Court stated that "the Sixth Amendment permits and even presumes open trials as a norm." *Id.* at 385. Fearing that its holding may be misconstrued, the Court said, "[w]e certainly do not disparage the general desirability of open judicial proceedings," *id.* at 393, and noted that the Court was not confronted with that issue.

188. See *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970). These cases, holding orders restricting extrajudicial comment on pending litigation to be prior restraints, stem from the line of cases known as the *Fair Trial v. Free Speech* cases. See text and accompanying note 190 *infra*.

189. *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979).

190. The *Fair Trial v. Free Speech* cases involve a conflict between the right to freedom of speech guaranteed by the first amendment and the right to a fair trial guaranteed by the sixth and

known as the "clear and present danger" test which provides protection for speech unless the expression creates a clear and present danger of bringing about a substantial evil.¹⁹¹ Due to its imprecise language, the "clear and present danger" test does not in a practical way solve the problem of evaluating the constitutional validity of particular restrictions.¹⁹² As Justice Brandeis said in his concurring opinion in *Whitney v. California*,¹⁹³ "[t]his Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."¹⁹⁴ In response thereto, the United States Supreme Court has created a working principle which states "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."¹⁹⁵ The *Halkin* court adopted this principle as the first of three

fifth amendments. *See, e.g.,* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (the Court held unconstitutional a prior order restraining a newspaper from publishing any information "strongly implicative" of an accused murderer); *Wood v. Georgia*, 370 U.S. 375 (1962) (the Court held unconstitutional a contempt of court order issued against certain public officials for publicly criticizing grand jury proceedings); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (a restraint of parties' counsel from commenting on the pending case was held unconstitutional); *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (an order banning relatives, close friends, and associates of parties from making extrajudicial statements was held unconstitutional). *See generally* *TRIBE*, *supra* note 115, at § 12-11.

In contrast to those decisions where the strict "clear and present danger" standard is applied to restraints on the freedom of speech when that freedom interferes with a fair trial, a group of cases has held that a lesser standard is to be used. These cases hold that where it is "reasonably likely" that an unfair trial will result, then the restraint on freedom of speech, whether prior or post, must stand. *See, e.g.,* *Estes v. Texas*, 381 U.S. 532 (1965) (the Court upheld an order issued by the trial court to prevent the press from televising the trial); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969) (the court upheld an order issued prohibiting publication of any comments by parties, counsel, or witnesses concerning the pending litigation).

191. *See* *Schenk v. United States*, 249 U.S. 47 (1919), where the Court upheld a federal statute which disallowed circulation of literature which denounced the United States system of conscription. *See also* text and accompanying note 121 *supra*.

192. *Bridges v. California*, 314 U.S. 252, 261 (1941).

193. 274 U.S. 357 (1927).

194. *Id.* at 374 (Brandeis, J., concurring).

195. *Bridges v. California*, 314 U.S. 252, 263 (1941). The dissenting opinion in *Halkin* argues that less crippling harm will justify a protective order. *In re Halkin*, 598 F.2d 176, 206 (D.C. Cir. 1979) (Wilkey, J., dissenting). The dissent cites two examples of what it considers sufficient harm: business interests, *see* *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969), and personal embarrassment, *see* *Nichols v. Philadelphia Tribune Co.*, 22 F.R.D. 89 (E.D. Pa. 1958). Concerning the majority's requirement that there be an exceedingly high probability of the harm occurring, the dissent says only a reasonable likelihood of occurrence is necessary. 598 F.2d at 206 (Wilkey, J., dissenting). Lastly, the dissent points out that the formal and specific factual findings necessary to justify an order which restricts freedom of speech under the *Fair Trial v. Free Speech* line of cases, *see* note 190 *supra*, is not necessary to justify orders restricting disclosure of discovery materials. "[I]t is enough that the district court provide a record sufficient for meaningful review." 598 F.2d at 206 (Wilkey, J., dissenting). The dissent's position, however, is based on the source of the information whose disclosure is sought to be restricted. Such a position, as already related, seems untenable in light of the United States Supreme Court's first amendment doctrine. *See* text accompanying notes 151-58 *supra*.

criteria against which protective orders restricting the disclosure of discovery material should be evaluated.¹⁹⁶

In most cases dealing with orders restricting the disclosure of discovered information, the harm expected to result from disclosure is a competitive disadvantage to the discoveree.¹⁹⁷ In *Halkin*, however, the court was applying the first criterion of its constitutional standard to a claim by the discoveree that the disclosure of discovered information would result in an unfair trial. The court mentioned two factors by which to assess the strength of a claim that an unfair trial will result: whether the trial is civil or criminal and whether a bench or jury trial is involved.¹⁹⁸ The court concluded that in criminal trials the argument that extrajudicial statements will harm the defendant substantially and seriously is much stronger than the same argument raised in a civil trial.¹⁹⁹ As to the bench or jury trial factor, the *Halkin* court decided that a principal concern about pretrial publicity is that a jury will be prejudiced; therefore, the argument that disclosure of discovered information will result in an unfair trial will be stronger in jury trials.²⁰⁰ Thus, *Halkin's* first criterion varies depending on the harm expected to result without the protective order.

The second constitutional standard set forth in *Halkin* to evaluate restrictions on the disclosure of discovered information is the "precision of the restrictions."²⁰¹ This criterion requires a specific showing that harm is likely to occur, to assure that the protective order is no broader than is absolutely necessary to prevent such harm from occur-

196. 598 F.2d at 192.

197. See text accompanying note 86 *supra*.

198. 598 F.2d at 192-93.

199. *Id.* The United States Court of Appeals for the Seventh Circuit, although not ruling on a requested restriction on discovery, agreed with *Halkin's* greater concern over extrajudicial statements made in a criminal case as opposed to those made in a civil case when it noted that "although we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity against the possibility for interference with fairness in criminal cases." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257-58 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976). The Seventh Circuit justified its conclusion on three grounds: (1) the difference in the sixth amendment's requirement of an "impartial jury" in criminal cases as opposed to the seventh amendment's guarantee of only a "trial by jury" for civil cases; (2) the difference in the length of civil and criminal trials—civil being much longer, thereby diluting the effect of any pretrial publicity; and (3) the nature of civil litigation, in that many times a civil suit is brought expressly for the purpose of gaining information for the public. 522 F.2d at 258.

200. 598 F.2d at 193. The contention that bench trials are less likely to be prejudiced than jury trials is credible despite the fact that judges are human and thus susceptible to the influence of prejudicial information, see *Cox v. Louisiana*, 379 U.S. 536, 565 (1965), since judges are "supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947).

201. 598 F.2d at 193.

ing.²⁰² How probable such harm must be in order to satisfy this second criterion remains an open question.²⁰³ Two formulas have been predominant in the courts' attempts to "crystallize the appropriate standard"²⁰⁴ for evaluating the probability of harm stemming from a protective order which restricts extrajudicial statements in general: (1) the "reasonable likelihood" of harm test²⁰⁵ and (2) the "serious and imminent threat" of harm test.²⁰⁶ A lower probability of harm satisfies the "reasonable likelihood" test than will satisfy the "serious threat" test.²⁰⁷

When the harm expected to result from disclosing discovered information is an unfair trial, a difficult conflict arises between the constitutionally based rights to a fair trial²⁰⁸ and to freedom of speech. Both rights are believed to be fundamental to the maintenance of liberty in our society.²⁰⁹ The *Halkin* court suggests that in such a situation, the trial court should analyze the type of discovery documents, in conjunction with the type of litigation, to determine the probability of harm necessary to restrict first amendment rights.²¹⁰ The federal circuits are split as to which standard to apply when confronted with a conflict between the right to free speech and the right to a fair trial.²¹¹

202. *Id.* "[T]he trial court, [therefore], must also require a specific showing that dissemination of the discovery materials would pose a *concrete threat* to an important countervailing interest." *Id.* (emphasis added).

203. As the *Halkin* court stated, "[c]ourts have struggled mightily to capture in words the requisite probability of harm mandated by the First Amendment, seeking to maximize the range of possible expression consistent with the valid claims of important conflicting interests." *Id.* at 193 n.42.

204. *Id.*

205. *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Society of Professional Journalists v. Martin*, 431 F. Supp. 1182, 1188 (D.S.C.), *aff'd with qualifications*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137, 1148-52 (E.D. Va. 1976).

206. *See* Wood v. Georgia, 370 U.S. 375 (1962); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975); *Columbia Broadcasting System, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975); *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971).

207. *See* note 190 *supra*.

208. *See* U.S. CONST. amend. V, which provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against; to have favor, and to have the Assistance of Counsel for his defense.

209. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Wood v. Georgia*, 370 U.S. 375 (1962).

210. 598 F.2d at 193 n.42.

211. *See* note 190 *supra*. The confusion that confronts the courts as to the probability of harm needed to overcome first amendment protections against restrictions on disclosure of discovered

The last criterion, that less intrusive alternatives do not exist, means that once the requisite likelihood of harm is found, if there is no other way to prevent such harm, then the protective order may be granted. For example, when the harm expected to result from disclosure of discovery material is an unfair trial, the court's alternatives to a protective order include a change of venue,²¹² postponement of trial,²¹³ or sequestration of jurors.²¹⁴ The alternatives are not so plentiful when the alleged harm is business damage. This should increase the likelihood that a protective order restricting disclosure of discovered information will be issued when the harm expected to result from disclosure is business damage.

Thus, the majority in *Halkin* views the conflict between the first amendment's guarantee of free speech and restrictions on disclosure of discovery material which are alleged necessary to prevent an unfair trial as an extension of the conflict involved in the *Fair Trial v. Free Speech* cases. Accordingly, the *Halkin* court applies to its order restricting disclosure of discovery, with some modification, the constitutional standard which the *Fair Trial v. Free Speech* cases apply to restrictions on the publication of any extrajudicial comments concerning pending litigation. This constitutional standard evaluates requested protective orders on three criteria: whether the harm from disclosure is substantial, whether the order is drawn narrowly, and whether alternatives to the order exist.

Dissenting Opinion

The dissenting opinion in *Halkin* denounces the majority's application of the strict constitutional standard to the protective order, thereby illustrating that the rationale of the *Parker*, *Koons*, and *Rodgers* decisions has not been forgotten.²¹⁵ In keeping with the tradition of the trilogy, the *Halkin* dissent argues that prior restraints can be di-

information when the competing interest is the sacred, constitutional right to a fair trial should dissipate when the competing interest is not so fundamental to liberty. Thus, when damage to business from disclosure of trade secrets is offered as the competing interest, the higher probability of harm—"serious and imminent threat"—could more easily be used to decide whether an order restricting the disclosure of such information was drawn narrowly enough. See *In re Halkin*, 598 F.2d 176, 194 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977). However, the fact that alternatives to a protective order do not exist to protect a discoveree from business damage resulting from disclosure of secret discovery information may negate any increase in first amendment protection that would result from the use of the "serious threat" of harm test. See text accompanying notes 212-14 *infra*.

212. *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 563-64 (1976).

213. *Id.*

214. *Id.*

215. 598 F.2d at 200-15 (Wilkey, J., dissenting).

vided into two categories: those solely directed at information and documents obtained in discovery and all other orders restricting expression.²¹⁶ Only the second type of restraint, the dissent contends, requires the application of the constitutional standard; the first type is judged by rule 26(c)'s good cause standard.²¹⁷ Underlying this contention is the theory that since the litigants obtain information through the discovery process over which the court has extensive power, the first amendment interests in protecting the free publication of that information can be limited by this power.²¹⁸ Judge Wilkey stated that "litigants who wish to disseminate discovery materials have gained access to such materials—access which they would not ordinarily have—through a statutory system that expressly reserves to the courts the power to attach restrictions on the use of such materials."²¹⁹ The same theory was used in *Rodgers* and, as already shown, seems untenable in light of the United States Supreme Court's holdings against presumptions of waivers of fundamental rights.²²⁰

*Critique of the Courts' Resolution of First Amendment Rights in
Discovery*

Halkin now stands as the strongest precedent for the use of a strict constitutional standard to judge restrictions on disclosure of discovered information. This constitutional standard can be compared with rule 26(c)'s good cause standard as it applies to restrictions on disclosure of discovered information. The good cause standard requires a showing of a probable, serious, and clearly defined harm to the party against whom discovery is sought before a protective order will be granted,²²¹ whereas an imminent and extremely serious harm is required to pronounce such an order constitutional. Although similar in form, the difference in substance between these two standards may be considerable. The constitutional standard requires specific factual findings of substantial and serious harm which would result from disclosure of discovered information.²²² The rule 26(c) standard, on the other hand, merely requires a showing that the harm is not theoretical but likely and that the harm is serious, not trivial.²²³ Thus, showing the harm

216. *Id.* at 204.

217. *Id.*

218. *Id.* at 206.

219. *Id.*

220. See text accompanying notes 161-65 *supra*.

221. See text accompanying notes 65-73 *supra*.

222. See *Brink v. Dalesio*, 82 F.R.D. 664, 678 (D. Md. 1979).

223. *Id.* See also text and accompanying note 68 *supra*.

necessary to support an order restricting disclosure of discovery information should be substantially more difficult under the constitutional test than under rule 26(c)'s good cause standard.

Although *Barron's* and *Halkin* clearly hold for the use of the constitutional standard, it can be argued that their holdings should be limited to their facts. *Barron's* involved an order which restricted a newspaper from disclosure.²²⁴ Newspapers traditionally have received special protection under the first amendment.²²⁵ Thus, it can be argued that the *Barron's* court applied the constitutional standard to the protective order only because of the special importance courts place on a free and unrestricted press. However, recent United States Supreme Court decisions which deny special first amendment protection to the press render this restrictive reading of *Barron's* unlikely.²²⁶

Halkin's holding can also be argued as limited to its facts. The primary purpose of the first amendment's protection of free speech is to enlighten public decision-making in a democracy.²²⁷ Since *Halkin* involved a case against governmental agencies,²²⁸ the disclosure of any information obtained from those agencies would be fundamental for the public to make enlightened decisions about their government. Thus, it can be argued that the *Halkin* court applied the constitutional standard to the order only because information about the government was involved. However, the *Halkin* court intended its holding to be read more broadly. The court not only expressed its dissatisfaction with the *Parker*, *Koons*, and *Rodgers* holdings²²⁹ but it expressly concluded that in each case a trial judge must determine that the protective order meets the criteria mandated by the first amendment.²³⁰ Thus, the District of Columbia Circuit's strong advocacy of the use of a constitutional standard cannot be interpreted away by an attempt to narrow the court's holding to its facts.

224. *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

225. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

226. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (the Court approved exclusion of the press from a pretrial suppression hearing in a murder prosecution); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (the Court denied a newspaper's claim that the first amendment required that a search of the newsroom should proceed by subpoena rather than by the more intrusive search warrant).

227. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Marsh v. Alabama*, 326 U.S. 501 (1946).

228. 598 F.2d at 179-80.

229. *Id.* at 188-89.

230. *Id.* at 195.

THE GOOD CAUSE STANDARD V. THE CLEAR AND PRESENT DANGER STANDARD

The principal question that emerges from this note is whether to use the "good cause" standard or the first amendment "clear and present danger" standard to evaluate orders which restrict disclosure of discovery. Although use of the good cause standard will offer discoverees more adequate protection from harm expected to result from disclosure, use of the constitutional standard finds support in both logic and policy.

The theory that a court's inherent power over its own process, in and of itself, justifies an abrogation of a discoverer's first amendment rights is logically unsound. The underlying justification for the grant of an order restricting expression derives from a balancing of the benefits to be brought about by the order with the first amendment interests in freedom of expression, not in any independent notion of the court's inherent power.²³¹ To conclude otherwise would return our jurisprudence to the days when kings had the ability to justify incursions into one's fundamental rights solely on the basis of their inherent power.²³²

Since the proper focus in deciding the permissibility of restraints on disclosure of discovery information should be on the balancing of the competing interests involved in the restraint, the inclusion of the first amendment interest would mandate the use of the strict constitutional standard.²³³ The *Halkin* dissent, as well as *Koons* and *Rodgers*, attempt to avoid this analysis by altering the interests involved in a *Halkin* situation. By using the court's inherent power over its own process to justify conditioning access to discovery on a waiver of first amendment rights,²³⁴ *Halkin's* dissent, *Koons*, and *Rodgers* eliminate the first amendment interest which, if involved, would command the

231. A protective order which restricts disclosure of discovery must satisfy rule 26(c)'s good cause standard before it can issue. This standard is a balancing test, weighing the benefits expected to result from the order against the discoverer's interests in disclosure. See text accompanying notes 24 and 55 *supra*. Included within the discoverer's interest in disclosure is his first amendment right to protection of free speech. See text accompanying notes 112-14 and 167-88 *supra*. The United States Supreme Court uses a balancing test to evaluate the constitutionality of restrictions on free expression. See *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). See also Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387 (1979).

232. See 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 276-77 (1924) [hereinafter referred to as HOLDSWORTH].

233. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

234. See text accompanying notes 134-38, 143-44 and 218 *supra*.

use of a strict standard.²³⁵ With the first amendment interest no longer involved, the lower good cause standard can be applied justifiably to restrictions on disclosure of discovery. This attempt to circumvent an application of a standard properly based on the interests involved should fail in light of the United States Supreme Court's abhorrence for finding waivers of first amendment rights.²³⁶ Indeed, the Court has expressly stated that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the [restriction]."²³⁷ Thus, according to the logic which the United States Supreme Court applies in its analysis of first amendment interests, the strict constitutional standard should be applied to restrictions on disclosure of discovery.

Although use of a strict constitutional standard will deny protective orders where the less strict good cause standard would have allowed them, trade secrets can still remain protected under an application of the stricter standard. First amendment analysis considers the extent to which the content of the information informs the public as a factor for evaluating restraints on the expression of such information.²³⁸ Since disclosure of trade secrets is not as valuable for informing the public as disclosure of government secrets, for example, protective orders denying disclosure of trade secrets will more likely withstand the scrutiny of the constitutional standard.²³⁹ Most important, the use of the constitutional standard allows for a realistic consideration of the value of disclosure of the information whereas the use of

235. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977).

236. See text accompanying notes 159-65 *supra*.

237. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). *Bigelow* involved a suit against a newspaper editor for publishing an advertisement announcing that it would arrange low cost abortions, thereby violating a Virginia statute. The court held the statute unconstitutional in violation of the first amendment's protection of free speech. The Court rejected the state's argument that because the advertisement was "commercial," it was unprotected by the first amendment. *Id.* at 825.

238. In *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), the United States Supreme Court focused on the worth of the speech for informing the public, rather than the source of the speech, in analyzing the constitutionality of the statute alleged to have restrained first amendment rights. *Id.* at 783. A principal factor for determining constitutionality, according to the Court, is the content of the speech. *Id.* at 777. Since *Bellotti* involved a restraint on expression concerning governmental affairs, a "type of speech indispensable to decisionmaking in a democracy," the Court struck down the restraint. *Id.* See also *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), where the court stated that first amendment interests vary according to the type of expression subject to the order. The court noted that "[a]n order restraining . . . political speech, implicates different interests than an order restraining commercial information." *Id.* at 191 (citations omitted).

239. See note 238 *supra*. Patent information may command more protection than information discovered in antitrust proceedings. See text accompanying notes 89-95 *supra*.

the good cause standard does not.²⁴⁰

Policy considerations also justify using the stricter standard to assess restrictions on disclosure of discovery. It is the general position of both courts and legislatures that pretrial proceedings of the federal judicial system are ordinarily conducted in public.²⁴¹ It is only through public proceedings that the administration of justice can occur.²⁴² Lest we return to the secret inquiries of the Star Chamber,²⁴³ the strict constitutional standard should be used to provide adequate protection for disclosure of discovery material.

An argument is made that use of the strict constitutional standard burdens an already overburdened discovery process²⁴⁴ by encouraging litigants to discover greater amounts of information in the hope that embarrassing information will be found. However, rule 26(b) limits discovery to only information relevant and necessary to the pending litigation.²⁴⁵ Also, the far greater burden will be placed on courts using the good cause standard. Upon ruling on a requested protective order, the courts must rummage through discovered information to decide whether publicized information was derived from discovery.²⁴⁶ Thus, the claim that using a stricter standard in judging restrictions on disclosure of discovery will result in further burdens to an already overworked discovery process is tenuous at best.

IMPLICATIONS OF USING A CONSTITUTIONAL STANDARD

Apparently, use of the strict constitutional standard to evaluate restrictions on disclosure of discovery produces an anomaly. It now becomes easier to restrict discovery itself than to restrict disclosure of the discovery. This would seem to run afoul of the very purpose of the discovery rules; that is, to allow a liberal flow of information between the parties. Such is not necessarily the case.

240. See text and accompanying note 238 *supra*.

241. See *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969); FED. R. CIV. P. 43(a); note 49 *supra* and accompanying text; see also *Publicity in Taking Evidence Act*, 15 U.S.C. § 30 (1976) (discovery process in antitrust litigation to be held in public).

242. See U.S. CONST. amends. V, VI; see also *Hickman v. Taylor*, 329 U.S. 495 (1947); text accompanying note 49 *supra*.

243. See 5 HOLDSWORTH, *supra* note 232, at ch. IV, § I.

244. See *First Amendment Right*, *supra* note 182, at 1559.

245. FED. R. CIV. P. 26(b).

246. *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977). Cf. *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977) (in camera inspection places heavy burden of inspection on trial judges).

Because courts rarely grant orders denying discovery altogether,²⁴⁷ the comparative ease with which restrictions on discovery are granted does not prevent the flow of information but merely alters it. Also, because protective orders are sought to restrict specific instances of abuse during the discovery process, they create little impediment to the generally free flow of information. Absent use of the constitutional standard, however, the public may be precluded from exposure to appropriate information. Furthermore, courts for some time have recognized that rule 26(c)'s good cause requirement itself applies a stricter standard to restrictions on disclosure of discovery.²⁴⁸ Therefore, as the courts have recognized, the apparently anomalous result of using a constitutional standard is justified by the small intrusion restrictions on discovery place on the discovery process as compared to the substantial hindrance restrictions on disclosure place on the public's right to know.

Commentators argue that use of the constitutional standard may make courts reluctant to grant discovery of sensitive information in the first place for fear that future attempts to prevent disclosure may fail.²⁴⁹ A recent district court case views the potential effects of the *Halkin* standard as less prohibitive. In *Brink v. Dalesio*,²⁵⁰ plaintiff, a union member, brought suit against the union and one of its officers claiming numerous violations of statutorily imposed fiduciary obligations allegedly owed to the union and its members. Because defendant had been under investigation by the United States Attorney's Office for related activities, an order sealing certain documents had been imposed. Plaintiff sought to lift the seal on the grounds that it unjustifiably burdened the judicial process and constituted a prior restraint on free expression. The court denied plaintiff's request.²⁵¹

Commenting generally on *Halkin*, the *Brink* court emphasized that the ultimate impact of the use of the *Halkin* standard has been exaggerated. The court noted that the standard still leaves the judicial inquiry considerable flexibility in determining the variables of the *Halkin* approach. The court added that the new standard simply entails additional scrutiny of a judge's good cause determination and will not alter present procedures, assuming judges have good reasons for their orders.²⁵² Thus, fears over the potentially prohibitive effects of

247. See text accompanying note 41 *supra*.

248. See text accompanying notes 54-59 *supra*.

249. See *First Amendment Right*, *supra* note 182, at 1559; Comment, 48 U. CIN. L. REV. 900 (1979).

250. 82 F.R.D. 664 (D. Md. 1979).

251. *Id.* at 678.

252. *Id.* at 677-78.

using the constitutional standard should be allayed by this recent interpretation and application of *Halkin*.²⁵³

Thus, at first glance, use of the constitutional standard seems unreasonable. However, upon closer examination, it appears that the standard allows for a more realistic evaluation of the interests involved by considering the value of the information to be disclosed for informing the public. Trial courts will not be foreclosed altogether from restricting disclosure of discovery. They simply must support the issuance of their orders with more specific findings of fact, attempt to draw their orders more precisely, and look for alternatives which impinge less on the right to free speech. Although use of the constitutional standard impinges slightly on the discovery process, far more important interests are served by the adoption of the stricter standard.

CONCLUSION

Federal Rule of Civil Procedure 26(c) provides for orders to protect against any abuse emanating from the liberal discovery process. Specifically, rule 26(c) allows a person, upon good cause shown, to restrict either discovery itself or the disclosure of discovery.

Rule 26(c)'s good cause standard requires the moving party to show that the harm resulting from either the discovery or its disclosure outweighs the discoverer's need for either the discovery or its disclosure, depending upon the restriction sought. The good cause standard is somewhat stricter when applied to restrictions on disclosure of discovery because of the first amendment interests involved, the difficulty in ascertaining the potential harm from disclosure and the public interest in public litigation.

Restrictions are sought particularly on the disclosure of trade secrets which generally encompass secret research, secret developments, and commercial information. The desire for these restrictions most often arises in patent and antitrust litigation. Patent information is granted more protection from disclosure than information concerning antitrust violations. This is because information of antitrust violations has a much higher value for informing the public than does patent information.

Recently, the constitutionality of restrictions on disclosure of dis-

253. *But see In re Upjohn Co. Antibiotic Cleocin Prods.*, 81 F.R.D. 482 (E.D. Mich. 1979), where the trial court relied in part on *Halkin* to justify its denial of Upjohn's request for a protective order to prevent disclosure of information obtained through discovery. *Upjohn* involved multi-district litigation and the defendant sought protection from disclosure to plaintiffs in independent state cases based on similar causes of action.

covery has come into question. Prior to 1977, the courts applied rule 26(c)'s good cause standard to restrictions on disclosure of information obtained through discovery, and the first amendment's "clear and present danger" standard, which requires a showing of a serious and imminent harm, was applied to restrictions on disclosure of information obtained elsewhere. However, two recent cases hold that the strict first amendment standard should be used to evaluate all restrictions on disclosure of information, regardless of the information's source or the manner of its acquisition. This recent view has the blessings of the United States Supreme Court which has decided that first amendment rights do not depend on the source of the expression.

The use of the strict constitutional standard to evaluate restrictions on disclosure of discovery is supported by logic and policy. Since the use of the strict constitutional standard allows for consideration of the value of the information for informing the public, disclosure of information vital to the public's welfare will be protected. Secret information which is valuable to its owner but not so valuable to the public's welfare, such as trade secrets, will also remain protected. This consideration of the value of the information, when added to the public's interest in open litigation, mandates the application of the strict first amendment standard to orders which restrict disclosure of discovery information.

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